

DATE: AUGUST 26, 1994

CASE NO.: 92-JTP-12

In the Matter of

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF LABOR AND
INDUSTRY,
Complainant

and

NORTHWEST PENNSYLVANIA
TRAINING PARTNERSHIP
CONSORTIUM, INC.,
Intervenor

and

SERVICE DELIVERY AREA #28,
Intervenor

v.

U.S. DEPARTMENT OF LABOR,
Respondent

Appearances:

Arthur Selikoff, Esq.
For the Commonwealth of
Pennsylvania, Department of
Labor and Industry

David L. Hotchkiss, Esq.
For the Northwest Pennsylvania
Training Partnership Consortium, Inc.

Raymond H. Bogaty, Esq.
For the Service Delivery Area #28

Michele W. Curran, Esq.
For the United States Department of Labor

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This case arises under the Job Training Partnership Act, 29 U.S.C. §1501 et seq. ("Act" or "JTPA"). The Commonwealth of Pennsylvania ("complainant" or "Commonwealth") appeals a January 24, 1992 Final Determination by the Grant Officer denying complainant permission to forego or waive collection of a debt owed by Northwestern Pennsylvania Training Partnership Consortium, Inc. ("NPTPC") for the misexpenditure of JTPA funds, or to offset that debt against any amount due NPTPC under JTPA.

The Grant Officer's January 24, 1992 Final Determination found that NPTPC was responsible for a misexpenditure of \$557,897.77 resulting from a willful disregard of the requirements of the JTPA and a failure to observe accepted standards of administration. The complainant appealed the Grant Officer's Final Determination to the Office of Administrative Law Judges on February 19, 1992. The case was docketed on March 16, 1992 by Order of the Office of Administrative Law Judges. Both parties filed pre-hearing statements on November 30, 1992.

On March 12, 1993, NPTPC petitioned for leave to intervene and on April 14, 1993, SDA #28 requested leave to intervene.¹ Both requests were granted by Orders dated April 2, 1993 and June 4, 1993, respectively.

On September 29, 1993 the Grant Officer filed a Motion for Partial Summary Judgment. A hearing on the merits of the appeal was held on October 18 and 19, 1993 in Harrisburg, Pennsylvania. At the commencement of the hearing the Motion for Partial Summary Judgment was ruled on and summary judgment was granted on one issue. Post-hearing briefs were submitted by the Grant Officer on January 31, 1994, by the Commonwealth of Pennsylvania on January 27, 1994, by Intervenor Service Delivery Area #28 on January 31, 1994 and by Intervenor NPTPC on February 2, 1994.

FINDINGS OF FACT

The JTPA was enacted by Congress to provide job training programs to assist unskilled youths and adults in entering the labor force. It is intended to afford job training to those economically disadvantaged individuals who are in special need of training to obtain productive employment. Title I of the JTPA,

¹SDA #28 succeeded NPTPC as the SDA grant recipient responsible for administering the JTPA program in Mercer and Lawrence counties of Pennsylvania, effective July 1, 1986. Although NPTPC administered the JTPA program in these two counties during the period relevant to this matter, SDA #28, as its successor, is responsible for the payment of any disallowed costs attributable to those counties.

"Job Training Partnership," provides for the establishment in each state of "service delivery areas" ("SDA") which are comprised of units of local government and which act as the primary vehicle for delivery of job training services. Title II, "Training Services for the Disadvantaged," provides for the delivery of a wide range of job training, counseling, remedial and basic skills education, and similar services to prepare disadvantaged young people and adults for, and assist them in securing, permanent employment. It also provides a summer jobs program for economically disadvantaged young people, providing counseling and training services as well.

The JTPA program is administered within Pennsylvania by the Pennsylvania Department of Labor and Industry, Bureau of Job Training Partnership. The Department contracted with NPTPC to administer Title II programs throughout the northwestern Pennsylvania counties of Clarion, Crawford, Forest, Lawrence, Mercer, Venango and Warren.

NPTPC was subject to a financial and compliance audit as a JTPA grantee by the Commonwealth of Pennsylvania Office of the Budget for the period September 1, 1983 through March 31, 1985. The Comptroller issued its Final Determination on January 8, 1987, disallowing \$571,548.60 as misexpended JTPA funds. The audit determined that NPTPC had misexpended \$557,897.77 by over committing its resources in the 1984 transitional year, and paying for work when additional funding became available in the following 1984 program year.² NPTPC appealed the finding to the Commonwealth Department of Labor and Industry. The finding was affirmed by a Commonwealth of Pennsylvania Hearing Officer Order dated April 21, 1988. The Hearing Officer's Order was upheld on review by the State Reviewing Officer as designee of the Secretary of the Department of Labor and Industry. However, the Reviewing Officer found that the misexpenditure was not due to willful disregard of the requirements of the JTPA, gross negligence, or failure to observe accepted standards of administration, and accordingly, determined that collection action against NPTPC would be inappropriate.

On April 28, 1988, the complainant requested a determination from the Grant Officer that it be permitted to forego collection of \$557,897.77 in disallowed costs from NPTPC, and that liability of the complainant with respect to the debt be waived. The Grant Officer requested additional information on the misexpenditure. Response was provided by both the complainant and NPTPC. On January 24, 1989, the Grant Officer informed the complainant that permission would not be granted to forego collection of the debt

²The audit found an additional misexpenditure of \$13,650.85 associated with security guard training, but that misexpenditure is not at issue here.

owed by NPTPC for misexpenditure of JTPA funds. The Grant Officer denied the request because he determined that neither the complainant nor NPTPC had fully satisfied the requirements of §164(e)(2) of the JTPA, 29 U.S.C. §1574(e)(2).

On December 22, 1989, the complainant requested that the Grant Officer consider a multi-year offset plan, whereby the complainant would collect the disallowed costs over time by withholding amounts from NPTPC's funding in future program years. The Grant Officer advised that he was willing to meet and discuss the options for resolution of this case, and on May 21, 1990 the complainant submitted a Plan of Action prepared jointly by NPTPC and SDA #28. The plan proposed to offset the misexpended costs over a ten year period. The Grant Officer replied on September 25, 1990 by advising that offset "is not an available option." The Grant Officer did not discuss the merits of the complainant's offset plan, but rather based his denial on the circumstances surrounding the misexpenditure, that is, he reasoned that an offset was not an option because the SDA failed "to take timely and appropriate administrative action to protect the integrity of JTPA funds and insure accountability."

On April 25, 1991, the complainant requested that the Grant Officer reexamine his position denying both waiver of liability and repayment through offset. The complainant also proffered that sanctions could not be imposed until the complainant was given the opportunity to pursue its procedural rights, i.e. notice and opportunity for fair hearing.

The Grant Officer issued his "Initial Determination" on September 26, 1991 and a "Final Determination" on January 24, 1992. Both determinations found a misexpenditure of \$557,897.77 by NPTPC, and opined that the misexpenditure "resulted from willful disregard of the requirements of the Act and failure to observe accepted standards of administration because NPTPC failed to take appropriate and corrective action after it began obligating funds at an excessive rate."

Complainant appealed the Grant Officer's final Determination on February 19, 1992. The appeal alleged that the Final Determination violated JTPA regulations at 20 C.F.R. §629.54(d)(3), and that the Grant Officer's action in requiring repayment rather than foregoing debt collection, allowing offset or permitting another negotiated plan of action was arbitrary, capricious, and contrary to the purposes of the JTPA.

Misexpenditure by NPTPC

The JTPA took effect on October 1, 1983. It supplanted the Comprehensive Employment and Training Act ("CETA"). The period of transition from the closure of CETA to commencement of the JTPA was October 1, 1983 to June 30, 1984, and was termed the

"transition year." It accommodated a change from the federal fiscal year of October through September to the JTPA program year of July through June.³ The program year following the transition year was July 1, 1984 to June 30, 1985. Congress' fiscal year 1984 budget appropriated money for the 1984 transition year and the 1984 program year.⁴

NPTPC was granted about three million dollars by the Commonwealth of Pennsylvania to operate JTPA programs during the transition period, October 1, 1983 to June 30, 1984. A lack of budgetary controls resulted in NPTPC over spending its grant to the extent that it was out of money by the first week of April.

Timothy Groves is currently the finance director for the City of Meadville, Pennsylvania. Groves worked for NPTPC as an accountant assisting the finance director during the transition year and the first program year of JTPA. His position was created to facilitate the transition from the CETA to JTPA programs. He testified about the conditions that led to the overspending. He traced its genesis to a report that was prepared on December 31, 1983 by NPTPC's finance department which revealed a "very large amount of underexpenditures." The report prompted the program administrator to accelerate the negotiating and signing of contracts on job training. However, a subsequent report was generated in late March, 1984 showing that the December 31, 1983 report was in error. Instead, the program's funding was overextended. The programs that were implemented and contracts signed committed more money than NPTPC had been granted.

Groves testified that the December, 1983 report presenting the incorrect picture of the Agency's finances was due to the newness of the JTPA program, and possibly not paying enough attention to JTPA while trying to close out the CETA program.⁵ The computer program was written to accrue expenditures on a

³Edward J. Donahue, a Grant and Contract Compliance Specialist with the U.S. Department of Labor, Employment and Training Administration, testified that the JTPA legislation provided for operating the program on a July to June basis because recent experience with programs such as CETA that were administered on the federal fiscal year, October to September, showed that their appropriations would remain in limbo during those years that Congress failed to pass its budget by the first of October. Contracts often were written with provisions that payment was contingent upon availability of funds. N.T. pp. 284, 285.

⁴N.T. pp. 285, 286.

⁵N.T. p. 84.

twelve month fiscal year instead of the nine month transition period. Also, the finance department was understaffed because of cutbacks in personnel at the end of CETA, and consequently, reports weren't prepared and imputed into the computer as efficiently as they would be later.

NPTPC decided to retain an outside certified public accounting firm, Black, Bashor and Porsh, to review its books and ascertain its financial status. The firm's report confirming the overspending was published during the first week of April. NPTPC subsequently took a full month to review each of its contracts to determine the extent of the overexpenditure. Groves estimates that NPTPC did not realize the nature and extent of the overexpenditure until early or mid May, 1984.

Gloria M. Miller was the Administrator of NPTPC from its beginning until February of 1985. Her testimony before the Commonwealth Hearing Examiner was admitted into evidence as Commonwealth of Pennsylvania Exhibit 1. She testified about the problems which caused NPTPC to overspend during the 1984 transitional period. She explained in a letter to the Deputy Secretary of the Pennsylvania Department of Labor and Industry that the over-expenditures "resulted from a lack of accurate, timely financial statements during the period October, 1983 through April, 1984." She elaborated that the Director of NPTPC's Finance Department used six weeks of earned vacation during October and November, 1983 and "that no other Financial Department employees had been provided with adequate instructions or appropriate training to maintain critical aspects of the financial reporting system."⁶ Miller disclosed that the programming error of having accruals on a 12 month basis rather than nine was not discovered until February, 1984. Miller felt that she was not being provided with reliable financial information until she instituted a manual system for tracking financial statements subsequent to an April report examining the finances. The computer system was not fully operational until July, 1984.

When NPTPC discovered its overspending had drawn down the total grant, it implemented steps to save money. During staff meetings on May 7 and May 16, 1984 the Regional Governing Board accepted recommendations from Miller that staff be laid-off, wages be frozen, and any unnecessary spending be curtailed.⁷ David Pearson, the Director of Operations during 1984, testified that 21 employees out of a total of about 50 or 60 were temporarily laid-off, and the remaining employees were placed on

⁶NPTPC Exhibit No. 18.

⁷Commonwealth Exhibit No. 1, testimony of Gloria Miller, p. 64.

a four day week and suffered an additional 10 to 15% reduction in pay. In addition all travel money, meal money and vacation time was suspended. Pearson informed that these cost reduction steps saved about \$300,000 during the period May 16 through June 30, 1984.⁸ Nevertheless, these steps were insufficient to preclude NPTPC from spending more money than it was allocated by over \$500,000.

Groves testified to the choices NPTPC explored to resolve the funding imbalance. It considered requesting the Commonwealth to supplement the grant but decided not to, apparently because it believed success to be unlikely. Groves testified that the Commonwealth was not contacted out of concern that if NPTPC sat back and waited for a response from the Commonwealth it could possibly have been too late to negotiate any adjustments with the contractors.⁹ Robert Connolly, Commonwealth Director of Employment and Services, testified that additional supplemental grants were not requested from the Commonwealth until after the transitional period. His recollection was that the request was denied.¹⁰

NPTPC discussed internally the possibility of summarily terminating contracts with its contractors. It decided against that alternative because of the negative repercussions it could have on the contractors, the trainees and the overall credibility of the training program. Ronald Haag was the Director of Operations at NPTPC during the period relevant to this matter. He testified to participating in strategy sessions over this possibility. It was concluded that terminating contracts and programs could in the end prove to be more costly. Disrupted courses likely would have to be repeated from the beginning, sometime in the future. Also, the subgrantees had costs they could not easily defray; they had contracts with teachers and leases for facilities they would have to honor. Cessation of funding for on-the-job training programs would require employers to breach commitments to trainees and result in hardship to the trainees. Groves testified that well over 1,100 participants would be affected by a termination of the programs and that its consequences precluded it as a viable option.¹¹

The course pursued by NPTPC in order to remain solvent was to postpone payment of the obligations it had incurred until the next fiscal year. The amount of the obligations postponed was

⁸N.T. p. 137.

⁹N.T. pp. 58, 59.

¹⁰N.T. pp. 219, 220.

¹¹N.T. pp. 54, 258-260.

\$557,897.77. Contract modifications allowing the postponement of payment were either negotiated with the contractors or were imposed unilaterally by NPTPC. NPTPC characterized these modified contracts as sliding scale or performance based contracts. The justification presented to the contractors for delay in payment was that compensation would now be made incrementally in accord with the progress the trainee made as he proceeded through the training program.¹²

An audit was performed by the Controller of the Office of the Budget of the Commonwealth for the period September 1, 1983 through March 31, 1985. Its report was submitted to the Commonwealth Department of Labor and Industry on July 26, 1985. The report recommended that \$557,897.77 be considered disallowed costs and recovered by the Commonwealth.¹³ The rationale for its recommendation is set forth in Finding No. 1, which provides in part:

Due to budgetary controls, NPTPC over committed their resources during the 1983-1984 transitional period. NPTPC had established too many training contracts with subgrantees, and rather than terminate some of the participants involved, the SDA decided to finance the contracts. This was accomplished by sliding scale payments, whereby, a smaller percentage was paid when additional funding became available in the 1985 FY. Based on our review of the contract files, NPTPC requested vendors to postpone billing until after July 1, 1984.

After comparing a list of FY 1985 budget revisions and sub-contractor files, it became apparent that the 1985 budget revisions were actually costs incurred in the 1983-1984 transitional period. NPTPC's records indicated a total of \$557,897.77 (\$208,655.58 OJT and \$349,242.19 CT costs) was incurred in the 1983-1984 transitional period and carried over to the FY 1985.¹⁴

¹²Commonwealth Exhibit No. 1, testimony of Gloria Miller, pp. 124-129.

¹³Administrative Record, Exhibit No. C-20, p. 114.

¹⁴Administrative Record, Exhibit No. C-20, p. 108.

The report informed that the practice of incurring costs in one fiscal year and reporting them in another fiscal year is prohibited by Federal regulations, Office of Management and Budget Circular A-122, and the Commonwealth of Pennsylvania's JTPA Policy and Procedural Manual.¹⁵

Forego Collection by Commonwealth

The Commonwealth, by letter dated April 28, 1988, requested a determination by the U. S. Department of Labor that it would be inappropriate for the Commonwealth to pursue collection from NPTPC of the disallowed costs. The letter cited 20 C.F.R. §629.44(d)(5) as authority. The letter also requested, in the alternative, a determination that the Commonwealth could forego collection of the funds under authority of 20 C.F.R. §629.44(d)(4). The request was denied by the Grant Officer on January 24, 1989. The Grant Officer reasoned that 20 C.F.R. §629.44 does not permit approval to forego debt collection because the facts show that NPTPC was at fault with respect to the liability criteria of §164(e)(2) of the JTPA. The Grant Officer agreed to reconsider the denial and, in order to facilitate the reconsideration, he requested additional information. After review of the submitted information, the Grant Officer on October 19, 1989 again denied the request to forego debt collection.

20 C.F.R. §629.44(d)(4) and (d)(5) govern the Secretary of Labor's discretion to forego the repayment of JTPA funds. Subsection (d)(4) provides that the Secretary may determine, based on a request from the Governor, that the Governor may forego certain collection actions against a subrecipient where that subrecipient was not at fault with respect to the liability criteria set forth in §164(e)(2)(A) through §164(e)(2)(D) of the Act. Subsection (d)(5) provides in part that the Governor shall not be released from liability for misspent funds under the determination required by §164(e) of the Act until the Secretary determines that further collection action, either by the Governor or subrecipient, would be inappropriate or would prove futile.

The two subsections, read together, restrain the Secretary's discretion to allow the Governor to forego collection from NPTPC. The Secretary may permit the Governor to forego collection where: 1) the subrecipient was not at fault in accord with the criteria of §164(e)(2)(A) through (D); and 2) the Secretary determines that further collection action would be inappropriate or would prove futile.

¹⁵Id. p. 113.

The Grant Officer argues that 20 C.F.R. §629.44(d)(5) precludes permission to forego collection from NPTPC because that subsection rules out such permission in all instances when the party at fault is a government entity, as the Secretary could never determine that "further collection action would prove futile" against a government entity or consortium such as NPTPC, particularly in light of the local government taxing authority.¹⁶ The Grant Officer's argument is rejected. The two reasons for permitting the Secretary to preclude taking further collection action by subsection (d)(5), that said action would be "futile" or "inappropriate," are in the disjunctive. Collection action may never be able to be considered futile against a government agency, but it could very well be "inappropriate."

Counsel for the Grant Officer in her Post-hearing brief concedes that the Secretary must also consider whether collection action would be "inappropriate." She argues that the complainant has not met its burden of showing that collecting the debt is inappropriate. The term "inappropriate" is not defined. Complainant and intervenors assume that it refers to economic conditions of the SDAs, apparently because of its usage in the same sentence with "futile." The Grant Officer argues that inappropriate does not refer to the economic conditions of the SDAs because the "federal government would not ever be able to collect misexpended funds from a local government, especially during a recession."¹⁷ In fact, counsel for the Grant Officer successfully objected to the parties presenting any evidence on the economic effect or hardship that repayment would cause the counties that comprise NPTPC and SDA #28.

The Grant Officer may have considered that subsection (d)(5) precludes him from allowing the Commonwealth to forego collection action because such collection could not be proven futile. However, it is clear that the Grant Officer did not consider whether requiring the Governor to take collection action against NPTPC would be "inappropriate." Accordingly, if subsection (d)(5) was the sole reason that offset was not granted, this matter would have to be returned to the Grant Officer for reconsideration of whether permission to forego collection action would be inappropriate.

¹⁶Testimony of Donahue, N.T. p. 293; p. 30 of Grant Officer's Post-hearing Brief.

¹⁷Grant Officer's Post-hearing Brief, p. 30.

Subsection (d)(4) provides that the Secretary may determine, based on a request from the Governor, that the Governor may forego certain collection actions against a subrecipient where that subrecipient was not at fault with respect to the liability criteria set forth in §164(e)(2)(A) through §164(e)(2)(D) of the Act.

Subsection (d)(4) limits the Secretary's discretion in allowing the Governor to forego collection actions against a subrecipient to those instances where the subrecipient was not at fault. The subsection does not give the Secretary such discretion here because the entity against whom the Governor would take collection action is the NPTPC, and the NPTPC was clearly at fault. Moreover, subsection (d)(4) provides that the subrecipient must not be at fault with respect to the criteria of §164(e)(2)(A) through §164(e)(2)(D) of the JTPA. Section 164(e)(2) governs authorization to impose a sanction against a recipient for violations by a subgrantee. Here, there is no involvement by a subgrantee. The entity committing the misexpenditure is the recipient itself, not one of its subgrantees. Accordingly, 20 C.F.R. §629.44(d)(4) does not provide authority for the Grant Officer to forego the collection of the funds misexpended by NPTPC.

It is determined that the Grant Officer lacks the authority under §629.44(d) to forego the collection of the misexpended funds. His authority may not be limited under (d)(5) because collection may be "inappropriate"; however, it is limited under (d)(4) because NPTPC was at fault.

Waiver

Authority to grant a waiver of repayment is governed by §164(e)(3) of the JTPA which provides that sanctions may be waived if the Secretary determines that the recipient has demonstrated substantial compliance with the requirements of paragraph (e)(2) thereof. Donahue testified that a waiver was precluded by paragraph (e)(2) because, as previously discussed, paragraph (e)(2) involves only authorization to impose sanctions against a recipient for violations by a subgrantee, and NPTPC was responsible for the misexpenditure, not the individual subgrantees with whom it had contracted.

Donahue testified to a second reason precluding the Grant Officer from granting the waiver; that is, because the complainant had not demonstrated compliance with the last two criteria of paragraph (e)(2). Complainant had not: "(C) acted with due diligence to monitor the implementation of the subgrantee contract, including the carrying out of the appropriate monitoring activities (including audits) at

reasonable intervals; and, (D) taken prompt and appropriate corrective action upon becoming aware of any evidence of a violation of this chapter or the regulations under this chapter by such grantee."

To show entitlement to a waiver, complainant must demonstrate that it acted with due diligence in monitoring NPTPC's JTPA program and that it took prompt and appropriate corrective action upon becoming aware of the misexpenditure.

Robert Connolly is presently Director of Employee Services and Training for the Commonwealth. His duties include state-wide administrative oversight over the JTPA program. He testified that there are two systems to monitor the expenditures of an SDA such as NPTPC under JTPA. One is through financial status reports that are submitted monthly by the SDA to the Commonwealth. Submissions are to be made by the fifteenth of the month for the preceding month. The report is filed electronically and reviewed by the Department of Labor and Industry controllers. The second monitoring system is an on-site review performed at least once a year at the SDA's location usually lasting from seven to ten days. It covers all compliance areas including equal opportunity, program contracting, SDA monitoring and expenditure of funds. An on-site review can be undertaken more often than annually if a problem is identified.¹⁸

Complainant's first monitoring of NPTPC was during an on-site visit February 8 through 10, 1984. That monitoring exercise did not reveal NPTPC's excessive spending because, according to Connolly, NPTPC's financial management system was inadequate to measure the level of spending.¹⁹ The follow up report cited NPTPC for four deficiencies but only one concerned financial difficulties. NPTPC had not submitted monthly financial status reports since the start of the JTPA program. Connolly testified that the Commonwealth was not aware of NPTPC's overcommitment of funds until May or June of 1984, and was not aware of the scope of the overspending until September or October. His recollection was that the Commonwealth was not formally notified of the problem by NPTPC, but rather they were alerted to NPTPC's financial problems by a copy of a letter from NPTPC placing their contractors on a deferred payment which "found its way back to our bureau."²⁰

¹⁸N.T. p. 204.

¹⁹N.T. pp. 225, 226.

²⁰N.T. p. 206.

The Regional Governing Board of NPTPC passed a resolution on May 16, 1984 requesting the Commonwealth to monitor and review the organization's finances and contracts for the period October 1, 1983 through May 31, 1984.²¹ In response to the resolution, the Controller for the Public Health and Employment Services of the Commonwealth undertook a review of NPTPC during mid-June, 1984. The report of the review was submitted to NPTPC under cover of a November 9, 1984 letter. The report identified various accounting and administrative control deficiencies such as unreliable accounting of funds committed to contractors, which in turn contributed to a lack of budgetary control.²² However, the report did not mention NPTPC's modification of contracts postponing payments until after July 1, 1984, even though Miller advised the auditors that they were pursuing that approach, and the auditors had complete access to NPTPC's records.²³

The Commonwealth conducted a third monitoring visit on July 17, 18 and 19, 1984. Although six deficiencies were noted in a two page report submitted to NPTPC on August 24, 1984 the rescheduling or postponement of payments to contractors was not identified.²⁴ A subsequent monitoring visit was conducted during the period December 10 through 20, 1984. The audit report is the first to identify as a deficiency NPTPC's use of 1984 program year funds for costs that were incurred during transition year 1984.²⁵

Complainant has not demonstrated that it acted with due diligence and carried out appropriate monitoring activities in its oversight of NPTPC's program. It was not passive in the number of monitoring visits. It conducted four on-site monitoring visits in fifteen months. However, if the monitoring visits are judged by their results, they were inadequate. They failed to recognize the brewing financial problems faced by NPTPC. The February monitoring visit failed to spot the overspending of funds. The problem was only brought to light as a result of the Commonwealth's receipt of a copy of NPTPC's letter to a contractor. Two subsequent program reviews failed to recognize as a deficiency the postponement of contract payments until the next fiscal year.

²¹Commonwealth Exhibit No. 1, testimony of Gloria Miller, pp. 93, 94.

²²Administrative Record, Exhibit No. H-59, p. 812.

²³ Commonwealth Exhibit No. 1, testimony of Gloria Miller, pp. 96, 97.

²⁴Administrative Record, Exhibit No. H-58, pp. 800, 801.

²⁵Id., Exhibit No. H-60, p. 834.

Also, one of the monitoring systems, that requiring monthly reports, was neglected, as NPTPC filed no reports until the complainant reported the failure to file as a deficiency after its February monitoring visit.

It is speculative to consider the type of corrective actions, if any, complainant could have taken had its monitoring programs exposed these problems. But, clearly, had the February visit identified the overspending, NPTPC could have implemented corrective changes much earlier, as NPTPC did not discover the overspending until April and the extent of the overspending until mid-May, 1984, and changes were not implemented until the May 7 and May 14, 1984 staff meetings.

Accordingly, it is determined that complainant should not be granted a waiver of repayment of the misexpended funds under section 164(e)(3) because it has not demonstrated substantial compliance with (e)(2) thereof.

Offset Of Repayment

On December 22, 1989, the complainant requested that the Grant Officer consider a multi-year offset plan, whereby the complainant would collect the disallowed costs over time by withholding amounts from NPTPC's funding in future program years. The Grant Officer advised that he was willing to meet and discuss the options for resolution of this case, and on May 21, 1990, the complainant submitted a Plan of Action prepared jointly by NPTPC and SDA #28. The plan proposed to offset the misexpended costs over a ten year period. The Grant Officer replied on September 25, 1990 by advising that offset "is not an available option." The Grant Officer did not discuss the merits of the complainant's offset plan, but rather based his denial on the circumstances surrounding the misexpenditure, that is, he reasoned that an offset was not an option because the SDA failed "to take timely and appropriate administrative action to protect the integrity of JTPA funds and insure accountability."

On April 25, 1991, the complainant requested that the Grant Officer reexamine his position denying repayment through offset.

The Grant Officer issued his "Initial Determination" on September 26, 1991 and a "Final Determination" on January 24, 1992. Both determinations found a misexpenditure of \$557,897.77 by NPTPC, and opined that the misexpenditure "resulted from willful disregard of the requirements of the Act and failure to observe accepted standards of administration because NPTPC failed to take appropriate and corrective action after it began obligating funds at an excessive rate."

Section 164(d) provides that "[t]he Secretary may offset

such amounts against any other amount to which the recipient is or may be entitled under this chapter unless he determines that such recipient should be held liable pursuant to subsection (e) of this section." Subsection (e)(1) requires repayment upon the determination that funds were misexpended because of "willful disregard of the requirements of the Act, gross negligence, or failure to observe accepted standards of administration."

The Grant Officer contends that NPTPC's actions constituted a willful disregard of the JTPA because NPTPC knew that "you can't use funds from one grant period to pay the costs of another".²⁶

At issue is whether the NPTPC's course of action in postponing payment of obligations it incurred during the transition year until the program year constituted willful disregard of the requirements of the Act. The parties agree that the definition of "willfulness" applicable here was defined by the United States Supreme Court in Trans World Airlines v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), as "knowing or reckless disregard" of whether actions are in violation of a statute. In McLaughlin v. Richland Shoe Company, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), the Supreme Court rejected a standard that would permit a finding of willfulness based on "nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a ... plan complied..." 486 U.S. at 135. The Supreme Court recently applied the Thurston definition of willfulness in Hazen Paper Co. v. Biggins, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), a case alleging discrimination under the Age Discrimination in Employment Act, which provides for liquidated damages if the violation is willful. The Court found the employer's actions were not willful. It reasoned that "[i]f an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed." 113 S.Ct. at 1709.

The Secretary of Labor determined that the actions of Massachusetts were willful under section 164(e) of the JTPA in Massachusetts v. Department of Labor, 85-JTP-1 (1985), under a standard later rejected by the Supreme Court in McLaughlin, supra. In Massachusetts, the Secretary defined willfulness as being cognizant of an appreciable possibility of being subject to the statutory requirements and failing to take steps reasonably calculated to resolve the doubt. Although the Secretary used an improper standard of willfulness, he likely would have found the existence of willfulness even under the Thurston standard of "knowing or disregard," as the record showed that "Massachusetts was repeatedly notified, by telegrams, letters, and in face-to-

²⁶Testimony of Edward Donahue, Jr. N.T. pp. 369, 370.

face meetings, that the Department of Labor considered the states position erroneous." 85-JTP-1 at 17.

Here, the complainant does not argue that program year monies could be used to pay transition year allegations. In fact, complainant concedes at page 10 of its post-hearing brief that NPTPC knew that it could not use program year funds to pay transition year expenses.²⁷ In accord is the Commonwealth Hearing Examiner's characterization of the testimony of the Administrator of NPTPC:

She further testifies to full familiarity with Section 161, which provided for the use of funds during the program year (fiscal year) and the two succeeding program years, as well as the parallel provision of 161 designated specifically for the transition 10/01/83 thru 7/01/84 fiscal year. Consequently, she was fully aware that future funds could not be used for an existing program or fiscal year's obligation. More, importantly, it is noted that appellant herein does not allege any ignorance of the budgetary scheme referred to above or the restriction upon the use of future funds for a current liability.²⁸

Complainant argues that although NPTPC knew that it could not resolve its transition year overexpenditure problems by using program year funds, it did not know that its modification of contracts to postpone payment until the program year constituted a violation of JTPA. In support of its argument, Complainant offers the testimony of Timothy Groves, Ronald Haag and Gloria Miller.

Groves, who worked as an accountant assisting the finance director during the transition and program years, testified that NPTPC believed its modification of the contracts was a solution to the overexpenditure problems that complied with JTPA requirements.²⁹ He characterized the modifications as comparable to implementation of a "modified accrual system." The only contracts that were modified were those that extended from the transition year into the program year. Groves reasoned that the modified contracts required the performance of services during both accounting periods, and the modification merely postponed payments to the accounting period when the service occurred. He equated the contract modifications to the implementation of

²⁷Post-hearing brief of complainant, Commonwealth of Pennsylvania, p. 10.

²⁸Administrative Record, Exhibit No. C-23. p. 169.

²⁹N.T. p. 59.

benchmarks. When benchmarks were achieved, payments would be made on the contracts.

Groves also testified that a prevalent view at NPTPC at that time was that the fiscal period was 21 months, broken down into the nine month transition period and the twelve month program period solely for reporting purposes. The modified contracts would be clearly proper in a 21 month fiscal year, as the obligations and their payments would take place in the same fiscal year.

Ronald Haag, the Director of Operations at NPTPC during the period relevant to this matter, testified that NPTPC determined that modification of contracts was the only realistic alternative for rectifying the overexpenditure problem, and then searched for authorization. Haag testified: "When we look at the decisions, when we look at the cost of the decisions, it was clear that the only way to go was modifying contracts, and then our problem became and I think we resolved, finding references in the Act that permitted those modifications."³⁰ Haag did not refer to any provision of JTPA permitting modified contracts. Rather, he testified that they could be justified under JTPA if considered to be "sliding scale" contracts. Haag's term "sliding scale" is another way of expressing what Groves characterized as modified accrual or performance based contracts, that is, contracts in which services are paid for over the life of the contract rather than at its commencement.

The testimony of Miller, the Administrator of NPTPC, on the modification of contracts was consistent with that of Haag. She testified that when considering methods of addressing the funding shortfall, NPTPC looked for a method to postpone payments until the next fiscal year. "What we looked at was what would be possible within the financial system, within the accrual system of the allocation of the funds, what would be possible to have within the fiscal year ending June 30th, what would be possible to carry over into the fiscal year beginning July 1."³¹ She believed that the modification of the contracts was an approach consistent with the JTPA because sliding scale contracts or performance based contracts had been and would continue to be used in the JTPA program.

It is determined that the action of NPTPC to compensate for its overspending during the transition year by modification of the existing contracts, constituted a willful disregard of the requirements of the JTPA. NPTPC is held to have known that such

³⁰N.T. p. 260.

³¹Commonwealth Exhibit No. 1, testimony of Gloria Miller, p. 70.

action was contrary to JTPA, or to have acted with reckless disregard of whether it was contrary.

In reality, the modification of the contracts was merely the vehicle used to appropriate money from the program year to pay for the obligations incurred during the transition year. Groves, Haag and Miller all agreed that the modified contracts were comparable to performance based, sliding scale and modified accrual contracts, and that such contracts are recognized under government grant programs. Their testimony is accepted. However, their testimony misses the point. These contracts were not modified to ensure their success or to aid their performance, but solely to allow for payment from the next fiscal year's funds. Many if not most of the modifications were unilateral. There was no attempt to negotiate an actual schedule of payment in line with a performance schedule; instead, the contractors were notified of a postponement of payment schedule.

Also, NPTPC did not make use of modified accrual contracts until it was faced with the funding shortage, and had to postpone payment. It only modified those contracts which extended into the next fiscal year and thus could abet the postponement of payments. None of the contracts which ended during the transition year were modified.

NPTPC offers no support or authorization for its decision to modify the contracts. It did not consult the Commonwealth or the U. S. Department of Labor. Complainant and NPTPC contend in their post-hearing briefs that "NPTPC was advised by a certified public accountant that it could revise its contracts to move expenses to the program year that otherwise would have been attributed to the transition year."³² However, their contention is not supported by the record. Groves was asked on direct examination whether NPTPC obtained the advice of any experts in the field of accounting. Groves answered in the affirmative and offered that he thought a CPA testified at the hearing before the Commonwealth Hearing Examiner "to the accounting principles at that time; and he worked closely with us in developing these standards." Groves also responded in the affirmative when asked whether the CPA testified that "it" was an acceptable process.³³ Groves testimony is too cryptic and vague to be meaningful. Did Groves mean that the CPA testified before the Hearing Examiner that accrual methods or performance based contracts are acceptable as accounting practices? Such an opinion is not in dispute. Moreover, it is consistent with the decision of the Hearing Examiner. The Commonwealth Hearing Examiner found that NPTPC's financial consultant advised NPTPC only that ammendments

³²Post-hearing brief of Complainant, p. 3.

³³N.T. pp. 56, 57.

to its contracts with the providers would be acceptable as an accounting procedure. Groves' testimony is not considered as standing for the proposition that a Certified Public Account counseled NPTPC that a modification of its contracts to move expenses to the program year would be a valid practice under JTPA.

If the complainant intended to show that NPTPC's actions were not willful through the testimony presented by a Certified Public Account before the Commonwealth Hearing Examiner to the effect that he counseled NPTPC that the modification of contracts to move expenses to the program year was an acceptable appropriation practice, complainant should have offered into evidence the testimony before the hearing examiner, or preferably, called the CPA as its witness in this proceeding.

The suggestion by Groves and Haag that NPTPC believed it could utilize funds from the program year because of a reference in the JTPA to a 21 month fiscal year is rejected. Miller testified that NPTPC contacted the Commonwealth to seek clarification of the 9-month/12-month grant period prior to the June, 1983 planning session, and, based on the Commonwealth's response, submitted a 9-month plan.³⁴ The plan was approved by the Commonwealth. By October, 1983 the Commonwealth and NPTPC had entered into a contract for the period October 1, 1983 to June 30, 1984. NPTPC also submitted a plan to the Commonwealth which was subsequently approved in February, 1984 for the 12 month program period of July 1, 1984 through June 30, 1985.³⁵ Thus, the record reveals that the NPTPC's planning activities with the Commonwealth assumed a nine month fiscal year followed by a twelve month fiscal year. Consideration of the twenty-one month fiscal year did not arise until the overspending was discovered, necessitating a justification for the shifting of obligations to the program year.

In summation, the complainant and intervenors have not met their burden of showing that the actions by NPTPC were not done in willful disregard of the requirements of JTPA. If NPTPC knew that obligating funds from the program year for transition year expenses was not permitted, then it must be assumed that NPTPC also knew that the means of achieving that result, modification of contracts, was not permitted. Therefore, NPTPC is not entitled under §164(d) of the JTPA to have the misexpended funds offset against amounts to which it is or may be entitled under JTPA.

³⁴Commonwealth Exhibit No. 1, testimony of Gloria Miller, pp. 207-209.

³⁵NPTPC Exhibit No. 10.

CONCLUSIONS OF LAW

1. NPTPC misexpended \$557,897.77 during the 1984 transition year and program year.

2. The practice of incurring costs in one fiscal year and reporting them in another fiscal year is prohibited by Federal regulations, Office of Management and Budget Circular A-122 and the Commonwealth of Pennsylvania's Policy and Procedural Manual.

3. 20 C.F.R. §629.44(d)(5) does not preclude the Secretary from granting the Commonwealth permission to forego debt collection from NPTPC because even though collection may never prove futile against a government entity, it may be inappropriate.

4. The Secretary's authority under 20 C.F.R. §629.44(d)(4) to allow the Commonwealth to forego collection actions against a subrecipient is limited to those instances where the subrecipient was not at fault.

5. Section 164(e)(2) of the JTPA does not authorize a waiver of repayment by NPTPC because the Commonwealth of Pennsylvania has not demonstrated that it acted with due diligence in monitoring NPTPC's implementation of subgrantee contracts and had taken prompt and appropriate corrective action.

6. The modification of contracts by NPTPC to compensate for its overspending during the transition year by postponing payment until the program year constitutes a willful violation of JTPA.

7. The Grant Officer does not have the discretion to offset the amounts owed as a misexpenditure by NPTPC because the complainant has not shown that the actions by NPTPC in modifying the contracts were not done in willful disregard of the requirements of the JTPA.

ORDER

IT IS HEREBY ORDERED that the appeals of the Complainant, Commonwealth of Pennsylvania, Intervenor, Northwest Pennsylvania Training Partnership Consortium, Inc., and Intervenor, Service Delivery Area #28, from the Final Determination of the Grant Officer dated January 24, 1992, denying Complainant permission to forego or waive collection of a debt or to offset the debt against any amount due Northwest Pennsylvania Training Partnership Consortium, Inc., under JTPA, are dismissed.

TMB:mr

THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL: The decision of the administrative law judge shall constitute the final action by the Secretary unless, within 20 days after receipt of the decision of the administrative law judge, a dissatisfied party files exceptions with the Secretary specifically identifying the procedure, fact, law, or policy to which exception is taken. Thereafter, the decision of the administrative law judge shall become the final decision of the Secretary unless the Secretary, within 30 days of such filing, has notified the parties that the case has been accepted for review. 29 U.S.C. §1576(b).

Any case accepted for review by the Secretary shall be decided within 180 days of acceptance, otherwise the decision of the administrative law judge becomes the final decision of the Secretary. 29 U.S.C. §1576(c).

Appeal from the final determination of the Department of Labor is with the U.S. Court of Appeals for the Circuit in which the affected parties reside or transact business. 20 C.F.R. §636.1(a).